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# ***Lovelace and Law Revisited: The Substantive Equality Promise of Kapp***

**Michael H. Morris and Joseph K. Cheng\***

## **I. INTRODUCTION**

There are few constitutional questions that have so confounded the Courts considering equality rights challenges as the relationship between sections 15(2) and 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> In a nutshell, the jurisprudence governing the role of section 15(2) since 1985 can, with some notable exceptions, be characterized as a history of duelling perspectives and confusion. The Supreme Court's recent decision in *R. v. Kapp*<sup>2</sup> holds out great promise that this confusion will be remedied. It also provides the most definitive restatement of the analytic framework under section 15(1) since the articulation of the test in *Law v. Canada (Minister of Employment and Immigration)*.<sup>3</sup> It is for these reasons that *Kapp* is arguably the most important decision on equality rights in the last 10 years.

The decision in *Kapp* sees the Court explicitly reaching into the past to articulate its vision of substantive equality. This is made manifest in the Court's frequent reference to (and reliance upon) jurisprudence and academic commentaries that pre-date its decision in *Law*. An examination of the legislative and judicial history of section 15(2) pre-*Law* is,

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>2</sup> [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"].

<sup>3</sup> [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].

therefore, an important means through which to gain insight into the Court's current thinking about substantive equality. Towards that end, this paper will examine and situate *Kapp* within this history, and discuss the potential (as yet unfulfilled) promise that it holds of a return to a more straightforward substantive equality analysis when addressing challenges to ameliorative programs. While acknowledging *Kapp*'s potential, this paper will also set out the many fundamental questions that are not yet answered by it. These questions include whether and how *Kapp* applies to under-inclusive challenges brought by disadvantaged claimants to ameliorative programs, and what role the contextual factors underlying the human dignity test set out in *Law* (and most particularly the correspondence analysis) may yet have.

*Kapp* was a Charter challenge brought by a number of mainly non-Aboriginal fishers against the federal government's granting of a communal fishing licence to members of three Aboriginal bands. This licence gave the bands in question the exclusive right to fish for salmon in the Fraser River for a period of 24 hours in August 1998. The appellants argued that the granting of the fishing licence to these bands discriminated against them on the basis of race, contrary to section 15(1). The Crown asserted that the licence was granted under a regulatory program which ameliorated the conditions of a disadvantaged group.

The Court dismissed the appeal, holding that the program was not discriminatory under section 15. In doing so, McLachlin C.J.C. and Abella J. contributed two important developments to the equality analysis. First, they provided a definitive restatement of the inquiry required under section 15(1), reformulating and refocusing the test from *Law*. Second, they breathed new life into section 15(2), hitherto a provision of the Charter that had been relegated to being an "interpretive aid" without its own independent force. In doing so, the Court articulated a new framework for assessing whether a particular government program is ameliorative such that it is not discriminatory under section 15(2). In both of these key respects, *Kapp* represents a jumping-off point for a new path in equality rights — arguably one that more clearly returns to the original substantive equality purpose lying behind the subsection. And it is the purpose of that subsection, and the early jurisprudence interpretation of it, that will be turned to next.

## II. THE LEGISLATIVE AND JUDICIAL HISTORY OF SECTION 15(2) PRE-*KAPP*

### 1. The Legislative History and Objective of Section 15(2): Canada Reaffirms its Commitment to Substantive Equality

It is often observed<sup>4</sup> that section 15(2) of the Charter was a response to a concern that Canada's enshrining of the principle of equality in its Constitution could render governments subject to "reverse discrimination" claims analogous to what was happening in the U.S. at that time — as was illustrated in the 1978 case of *Regents of the University of California v. Bakke*.<sup>5</sup> The United States Constitution does not contain an equivalent clause to section 15(2) of the Canadian Charter, and the U.S. Supreme Court adopted in *Bakke* — and continues to adopt<sup>6</sup> — a formalistic view of equality, applying a test of "strict scrutiny" to all race-based affirmative action programs. Specifically, the American approach to affirmative action requires that governments demonstrate that such programs serve a compelling state interest and be narrowly tailored to that interest.

The drafters of the Charter clearly signalled their firm rejection of this formal approach to equality in favour of a substantive approach. In contrast with the U.S. approach, this approach explicitly affirms the legitimacy of special positive government actions designed to ameliorate the situation of disadvantaged groups.

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<sup>4</sup> See, e.g., *Lovelace v. Ontario*, [1997] O.J. No. 2313, 33 O.R. (3d) 735, at 751 (Ont. C.A.) [hereinafter "*Lovelace* (C.A.)"], citing *M. (N.) v. British Columbia (Superintendent of Family and Child Services)*, [1986] B.C.J. No. 1712, 34 D.L.R. (4th) 488 (B.C.S.C.) [hereinafter "*M. (N.)*"].

<sup>5</sup> 438 U.S. 265. *Bakke* challenged a special program at Davis Medical School at the University of California which reserved 16 out of every 100 places for "economically and/or educationally disadvantaged and minority applicants". The U.S. Supreme Court struck down the program. Four Justices — Stevens, Stewart and Rehnquist JJ. and Burger C.J. — found that the program violated the 1964 *Civil Rights Act* and struck down the program upon that basis. Four other Justices — Brennan, Blackmun, Marshall and White JJ. — upheld the program. They found that the 1964 *Civil Rights Act* only prohibited racial distinctions that would violate the 14th Amendment. They further found that the important objective of remedying past societal discrimination was sufficient to justify the program under the 14th Amendment. Justice Powell agreed that the 1964 *Civil Rights Act* only prohibited discrimination that violated the 14th Amendment; however, the program did not survive the 14th Amendment.

<sup>6</sup> For two post-*Bakke* examples of the American approach, see *Adarand Constructors Inc. v. Peña*, 63 U.S.L.W. 4523 at 5430, 5431 to 5433 (U.S. 1995). See also: *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, at 493 and 507 (1989).

The legislative history supports this broad objective.<sup>7</sup> In particular, it is noteworthy that the original version of the proposed Constitutional Bill C-60 (given first reading in June, 1978) did not contain any provision protecting affirmative action.<sup>8</sup> In response to concerns raised during testimony, the special joint committee recommended to Parliament that:

special programs on behalf of disadvantaged groups or persons should be protected. Such programs are intended to prevent or reduce disadvantages suffered by groups on the basis of such factors as are specifically authorized by the *Canadian Human Rights Act* ... The proposed *Charter* should not prevent special programs on behalf of disadvantaged groups.<sup>9</sup>

As was pointed out by those advocating for protection of affirmative action programs, the principle of substantive, as opposed to formal equality, was already well established in the federal and provincial human rights codes prior to the Charter — and long before the controversial U.S. decision in *Bakke*.<sup>10</sup> For example, section 16(1) of the *Canadian Human Rights Act* states:

16(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.<sup>11</sup>

The willingness in Canada to embrace special measures for vulnerable minority groups also found expression in the *Constitution Act*,

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<sup>7</sup> See discussion in *Lovelace (C.A.)*, *supra*, note 4, at 752-53.

<sup>8</sup> Bill C-60, the Constitutional Amendment Bill, 30th Parl. (1st Reading: June 20, 1978).

<sup>9</sup> Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Second Report to Parliament (October 10, 1978), Minutes and Proceedings of Evidence, at 20:4, cited in Anne Bayefsky, *Canada's Constitution Act, 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson Ltd., 1989), at 424.

<sup>10</sup> Kenneth Fogarty, *Equality Rights and their Limitations in the Charter* (Toronto: Carswell, 1987), at 114.

<sup>11</sup> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 16(1); See also British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; Manitoba *Human Rights Code*, C.C.S.M. 1987, c. H175, s. 10; New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 13; Newfoundland and Labrador *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 19; Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 6(i); Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 14(1); Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 20; Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 86; Saskatchewan *Human Rights Code*, S.S. 1979, c. S-24.1, s. 47; Yukon *Human Rights Act*, R.S.Y. 2002, c. 116, s. 13.

1867. Specifically, section 93 provides for separate schools and section 133 protects language rights. In addition, the wording of section 29 of the Charter makes it clear that the Charter is not intended to affect the special rights or privileges otherwise guaranteed under the Constitution in respect of separate schools.<sup>12</sup>

Thus the legislative history of section 15(2) demonstrates the clear intent to silence any debate in Canada about the possibility of reverse discrimination lawsuits being initiated by individuals from socially privileged and/or advantaged sectors. As will be discussed below, that was a critical message to Courts in how they should interpret equality rights generally — and that message was heard.

While clear in respect of the broad message of substantive equality enshrined in section 15(2), the legislative history of the subsection does not shed any real light on how that section was supposed to work in practice. It is silent about the relationship of section 15(1) to section 15(2), namely, whether section 15(2) could be viewed as an exception to the guarantee of equality in section 15(1) or an affirmation of it. Was section 15(2) a defence to a section 15(1) equality breach claim, or simply an “interpretive” aid set out to enhance our understanding of section 15(1)? The legislative history surrounding section 15(2) also does not illuminate the practical and critically important question of how a Court should characterize an ameliorative program for purposes of section 15(2), nor what the appropriate level of judicial scrutiny of challenges to programs with ameliorative objectives should be.

This lack of clarity would be reflected in the confusing jurisprudence that clearly struggled with these practical questions in the first 15 years in the life of section 15 (and arguably to this day).

## **2. Jurisprudence Prior to *Lovelace*: An Elusive Search for the Appropriate Relationship between Subsections 15(2) and 15(1)**

Section 15(2) played a fundamentally important role in the early Supreme Court section 15 jurisprudence that fleshed out the Court’s commitment to a substantive approach to equality. The substantive equality message and purpose of section 15(2), as envisaged by the

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<sup>12</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 93, 133; *Charter*, *supra*, note 1, s. 29. See Walter Tarnopolsky, “The Equality Rights”, in Walter Tarnopolsky & Gérard-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 395, at 423-37 [hereinafter “Equality Rights”].

framers, was not lost on the Court. While it would not be until 2000 that the Supreme Court would decisively address the interpretation of section 15(2) or its relationship to section 15(1), the Court nevertheless made important passing references to the significance and operation of the section in its early equality jurisprudence. These references appear in cases such as *Andrews v. Law Society of British Columbia*, the Court's landmark (and now revived) decision on section 15. In *obiter* comments, McIntyre J. stated that the appropriate approach to justification was:

Where discrimination is found a breach of s. 15(1) has occurred and — where s. 15(2) is not applicable — any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1.<sup>13</sup>

This position would seem to support the proposition that section 15(2) could be used as a defence to a challenge under section 15(1) once a finding of discrimination had been made out. However, in *Andrews*, McIntyre J. also suggested that section 15(2) could be used as an interpretive device for section 15(1), remarking:

... the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do “not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ...”<sup>14</sup>

A similar statement about the substantive equality message set out in section 15(2) was made by La Forest J. in *McKinney v. University of Guelph*:

The Charter itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for dealing with inequality might themselves create inequalities.<sup>15</sup>

Clearly, the highest Court understood the broad message about substantive equality inherent in section 15(2). Yet not facing a case directly posing the issue of how to apply section 15(2) it — perhaps deliberately — provided no guidance on how the subsection actually

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<sup>13</sup> [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 182 (S.C.C.) [hereinafter “*Andrews*”].

<sup>14</sup> *Id.*, at para. 34.

<sup>15</sup> [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 318 (S.C.C.) [hereinafter “*McKinney*”].

operated in the face of a challenge to an ameliorative affirmative action program.

The lower courts did not assist in filling the early jurisprudential void surrounding section 15(2). In its totality, the section 15(2) jurisprudence leading up to the Ontario Court of Appeal's decision in *Lovelace v. Ontario* can be characterized as a tale of dissents, minority judgments and *obiter* comments.<sup>16</sup> Very few cases conducted a thorough analysis of the section, and those that did rarely agreed on the proper approach to be taken — particularly on the critical issue of what had to be proven in respect of a program's objects to bring it within the parameters of section 15(2). It was therefore not surprising that in *Lovelace*, neither the Ontario Court of Appeal nor the Supreme Court took any particular notice of this jurisprudence.<sup>17</sup>

*(a) Is the Object of the Program Within the Meaning of Section 15(2)?*

One of the main questions addressed in cases leading up to the Ontario Court of Appeal's decision in *Lovelace* is the degree of scrutiny applied to a government's defence that a particular program fell within the ambit of section 15(2). Is it enough for the government simply to say that a particular program is "ameliorative"? Does section 15(2) require a program have ameliorative objectives only, or does the government have to justify that it also has demonstrable ameliorative effects? Do the ameliorative objectives have to address the real cause of the disadvantage, or need it be merely beneficial generally? Does a program need to be exclusively ameliorative in its objective, or is it sufficient that its ameliorative purpose is one among others?

The decisions prior to the Ontario Court of Appeal's decision in *Lovelace* vary widely in their approach to these critical issues. In some instances, the courts adopted a fairly interventionist approach to programs defined as ameliorative, and in others, a somewhat more deferential approach was adopted.

At the most interventionist end of the spectrum, some courts required governments wishing to successfully invoke section 15(2) to establish

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<sup>16</sup> *Lovelace* (C.A.), *supra*, note 4. The authors acknowledge their debt to Michael Beggs, Counsel, Department of Justice, and Tracy Rotstein, who carefully reviewed and characterized this case law in this succinct manner in a thorough and prescient piece of legal research done over 10 years ago for one of the authors.

<sup>17</sup> *Id.*; *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.) [hereinafter "*Lovelace* (S.C.C.)"].



whether the discriminatory aspects are required if the ameliorative object of the legislation is to be attained.<sup>18</sup> Some academics argued that governments should have to demonstrate that an ameliorative program can actually achieve its ameliorative object in order to come within the meaning of section 15(2). These academics argued that a purpose-based approach leaves the door open to governments to defend potentially discriminatory legislation by simply invoking an ameliorative purpose, or inserting clauses asserting an ameliorative purpose directly into legislation. This could result in an unacceptable loophole in the protection of equality rights.<sup>19</sup>

Most academics — and Courts prior to *Law* — opted instead for a section 15(2) test that looked to the ameliorative purpose (or object) of the program or law, rather than its actual effects. This purpose-based approach was justified on the grounds of adhering most closely to the language of section 15(2) and avoiding an overly interventionist approach to judicial review.<sup>20</sup> Within this broad perspective, however, there were distinct differences in approach, ranging from fairly deferential to more interventionist. On the more interventionist end, some case law required the government to demonstrate a “real nexus or a rational relationship” between the objective of the program and the cause of the disadvantage. This approach was adopted in the 1988 Manitoba Court of Appeal decision in *Manitoba Rice Farmers Assn. v. Manitoba (Human Rights Commission)*.<sup>21</sup> This case is notable, in particular, for being on the interventionist end of the spectrum of case law and (interestingly) being explicitly referred to with approval by the Court in *Kapp*.<sup>22</sup> It was nevertheless criticized at the time by some academics for being unworkable, given the difficulties in identifying and redressing the root causes of disadvantage. As a practical matter, it is inherently

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<sup>18</sup> *Friesen v. Gregory*, [1986] S.J. No. 662, 55 Sask. R. 245 (Sask. U.F.C.).

<sup>19</sup> See, e.g., M.D. Lepofsky & J. Bickenbach, “Equality Rights and the Physically Handicapped” in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), at 323-80. This article is canvassed in *Kapp*, *supra*, note 2, at para. 45.

<sup>20</sup> See Michael Pierce, “A Progressive Interpretation of Subsection 15(2) of the Charter” (1993) 57 Sask. L. Rev. 263, cited and relied upon in *Kapp*, *supra*, note 2, at para. 44.

<sup>21</sup> [1987] M.J. No. 553, 50 Man. R. (2d) 92 (Man. Q.B.), varied on appeal (*sub nom. Apsit v. Manitoba (Human Rights Commission)*), [1988] M.J. No. 577, 55 Man. R. (2d) 263, at 270 (Man. C.A.) [hereinafter “*Manitoba Rice Farmers*”].

<sup>22</sup> *Supra*, note 2, at paras. 46 and 48. See discussion below.

difficult to identify “causes” of disadvantage that may reflect or form part of a complex social phenomenon underlying disadvantage.<sup>23</sup>

A somewhat less interventionist articulation of the “purpose-based” approach was adopted in a modified fashion by another group of cases which imposed a requirement that governments demonstrate a “rational connection” between the preferential treatment and the disadvantage.<sup>24</sup> A third approach adopted a “gross unfairness” test and required governments to demonstrate that the program had as its object the amelioration of the condition of disadvantaged individuals or groups *and* that the effect of the distinction drawn by the program was not so unreasonable as to be grossly unfair to other individuals or groups.<sup>25</sup>

*(b) Section 15(2) as an Exception or Defence to a Section 15(1) Challenge*

Up until the Ontario Court of Appeal’s decision in *Lovelace*, the jurisprudence interpreting section 15(2) was united on one point: almost all of this jurisprudence accepted, with little question, that section 15(2) was an “exception” to a claim under section 15(1). In other words, the proper framework for assessing a government’s claim of protection under section 15(2) was to find a *prima facie* infringement of section 15(1), then determine whether the infringement was saved under section 15(2).<sup>26</sup>

The characterization of section 15(2) as an exception or defence to a section 15(1) challenge was not merely of academic significance but one that profoundly changed the analysis. First of all, as an exception or defence, section 15(2) could only be used to “save” a distinction already found to be *prima facie* discriminatory under section 15(1). Second, the

<sup>23</sup> See Beatrice Vizkelety, “Affirmative Action, Equality and the Courts: Comparing *Action Travail des Femmes v. CN* and *Apsit and the Manitoba Rice Farmers Association v. The Manitoba Human Rights Commission*” (1990) 4 C.J.W.L. 287, at 307 [hereinafter “Vizkelety”].

<sup>24</sup> See, e.g., *M. (N.)*, *supra*, note 4.

<sup>25</sup> For an example of the “gross unfairness” test, see *R. v. Willocks*, [1995] O.J. No. 342, 22 O.R. (3d) 552, at 571 (Ont. Gen. Div.).

<sup>26</sup> See, e.g., *Manitoba Rice Farmers*, *supra*, note 21; *R. v. Willocks*, *id.*; *M. (N.)*, *supra*, note 4; *Harrison v. University of British Columbia*, [1988] B.C.J. No. 13, 49 D.L.R. (4th) 687 (B.C.C.A.) *revd* on other grounds [1990] S.C.J. No. 123, [1990] 3 S.C.R. 451 (S.C.C.); *R. v. Music Explosion Ltd.*, [1990] M.J. No. 444, 68 Man. R. (2d) 203 (Man. C.A.), *revd* [1989] M.J. No. 577, 62 Man. R. (2d) 189 (Man. Q.B.); *Schafer v. Canada (Attorney General)*, [1996] O.J. No. 1915, 29 O.R. (3d) 496 (Ont. Gen. Div.), *vard* [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.); *Shewchuk v. Ricard*, [1986] B.C.J. No. 335, 28 D.L.R. (4th) 429 (B.C.C.A.), leave to appeal refused, 10 B.C.L.R. (2d) xxxvi (S.C.C.).

adoption of a narrow or expansive view of section 15(2) depends upon this characterization. It is well recognized that Charter rights should be interpreted broadly. If section 15(2) is regarded as a restriction or exception to equality rights, then it should be interpreted narrowly. However, if the subsection is an interpretation or elaboration of equality rights, then it should be interpreted expansively. As one commentator succinctly put it, treating section 15(2) as an exception to the equality guarantee in section 15(1) creates an untenable paradox for those who truly advocate the promotion of substantive equality:

... section 15(2) would encourage the government and legislatures to establish affirmative action measures; on the other hand, section 15(1) would simultaneously declare them to be a *prima facie* violation of the *Charter*. This is, of course, an untenable interpretation of sections 15(1) and 15(2) of the Canadian *Charter*.<sup>27</sup>

What is really at stake in this debate is the degree of deference that will be offered to governments to adopt programs or activities assisting disadvantaged groups.

While these questions were difficult enough in the context of equality rights claims generally, they become particularly vexing and difficult when raised in the context of an under-inclusiveness claim by another disadvantaged group. This is where “the rubber hits the road” in terms of our understanding of how section 15(2) should relate to section 15(1) and it is the context that the Court did not have to address in *Kapp*. It is, therefore, worthwhile to examine in some detail how under-inclusive challenges to ameliorative programs have been dealt with prior to *Kapp*. As will be seen, of critical importance to this history was the shift in analysis between the Ontario Court of Appeal and Supreme Court of Canada in *Lovelace* — which shift would profoundly affect the state of the jurisprudence on section 15(2) for the 10 years following. In essence, it is that shift that was just revisited by the Court in *Kapp*.

### **3. Challenges to Affirmative Action Programs by Disadvantaged Groups on Under-inclusiveness Grounds: The *Lovelace* Decisions**

In claims of under-inclusiveness, a difficult choice has to be made as to how to balance the need to give governments flexibility to provide benefits to assist disadvantaged groups while reserving the right of

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<sup>27</sup> Vizkelely, *supra*, note 23, at 307.

improperly excluded groups to complain about their exclusion on under-inclusiveness grounds. The first serious judicial attempt to wrestle with section 15(2) in an under-inclusive context was the Ontario Court of Appeal's decision in *Lovelace*. While the Supreme Court upheld but did not ultimately endorse the approach of the appellate court to section 15(2), the analysis of the Ontario Court of Appeal is worth careful reconsideration. Much of what the Court of Appeal said about section 15(2) would resound 12 years later in the Supreme Court's decision in *Kapp*. As such, its analysis of section 15(2) takes on fresh importance as an indicator of what we might expect in the difficult analogous under-inclusive cases that courts will undoubtedly face in the future.

(a) *The Ontario Court of Appeal Decision: Section 15(2) as an Independent Ground Furthering the Guarantee of Equality*

*Lovelace*<sup>28</sup> was a challenge to an Ontario government program, in conjunction with the Bands of Ontario, to distribute profits from Casino Rama on the Rama First Nation Reserve to the registered Bands of Ontario. The project was based on an agreement entered into between Ontario's Bands and the government to develop the commercial casino. A variety of Métis and Aboriginal groups, not registered as Bands under the *Indian Act*,<sup>29</sup> challenged their exclusion from a share of the profits from the program as discriminatory under section 15(1) of the Charter. Ontario contended that the program was saved by section 15(2) as a program with the object of amelioration of a disadvantaged group. The lower court accepted the argument of the claimants; however, the Court of Appeal reversed the decision and upheld the constitutionality of the project, adopting a broad and purposive approach to section 15(2).

The Ontario Court of Appeal affirmed its view of section 15(2) "as furthering the guarantee of equality in section 15(1), not as providing an exception to it".<sup>30</sup> In doing so, the Court ignored the one nearly consistent aspect of the otherwise confusing appellate jurisprudence that preceded it. Interestingly, the Court chose to ground its substantive view of equality in the Supreme Court's jurisprudence — and in particular the landmark decision of *Andrews*:

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<sup>28</sup> *Supra*, note 4.

<sup>29</sup> R.S.C. 1985, c. I-5.

<sup>30</sup> *Lovelace* (C.A.), *supra*, note 4, at 752.

... the Supreme Court of Canada has consistently stated that the purpose of the equality guarantee in s. 15(1) is to remedy historical disadvantage, that identical treatment can perpetuate disadvantage and that equality may sometimes require different treatment. Section 15(2) enhances this concept of equality by recognizing that achieving equality may require positive action by government to improve the conditions of historically and socially disadvantaged individuals and groups in Canadian society.<sup>31</sup>

The Court set out the significance of this finding that section 15(2) was not an exception to the equality guarantee (distinguishing its decision from the vast majority of the section 15(2) cases that preceded it):

Interpreting s. 15(2) as explaining and enhancing s. 15(1), instead of as a defence or exception to it, affects how a s. 15(2) program should be analyzed. If s. 15(2) were a defence then it would be invoked only after a claim of discrimination under s. 15(1) had been established. Interpreting it as we do, s. 15(2) must be considered with s. 15(1) in determining whether a claim of discrimination has been established. Moreover, because special programs for the disadvantaged further the guarantee of equality, government action under s. 15(2) should be generously and liberally assessed ...<sup>32</sup>

That generous and liberal approach translated directly into the Court articulating the propriety of a limited judicial scrutiny of ameliorative programs, based on both the “words of s. 15(2) and policy considerations”, namely, the affirmation of the legitimacy of government laws, programs or activities whose object or purpose is the amelioration of the conditions of disadvantaged groups or individuals. Under this analysis, there was no need for an objective assessment of a program’s effectiveness — one need only look at the target and true purpose of an ameliorative program:

In other words, if the court is satisfied that the target of the government’s program is a disadvantaged group and the object or purpose of the program is to ameliorate the conditions of that group, the program fits within s. 15(2). Nothing in s. 15(2) calls on the court, for example, to assess the effectiveness of the program or the means used to achieve the government’s ameliorative object or whether a reasonable relationship exists between the cause of the disadvantage and the form of ameliorative action. If some aspect of the program infringes the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at 754.

equality guarantee, the government's rationale or justification ... should be considered under s. 1 ...<sup>33</sup>

The Court also emphasized how policy considerations, namely, the need to avoid discouraging governments from initiating ameliorative programs, also support limited judicial review of section 15(2) programs:

Governments have no constitutional obligation to remedy all conditions of disadvantage in our society. If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs. Governments should be able to establish special programs under s. 15(2) that distinguish between or even within groups protected under s. 15(1).<sup>34</sup>

The Court then opined that, while the "language and history of s. 15(2) seem to militate against challenges to s. 15(2) programs by members of socially advantaged or privileged groups",<sup>35</sup> under-inclusive challenges by disadvantaged groups were distinct. In under-inclusive claims, one had to distinguish between challenges by disadvantaged groups *within* the object of the program and challenges by disadvantaged groups *outside* the objects of the program:

A s. 15(2) program that excludes from its reach disadvantaged individuals or groups that the program was designed to benefit likely infringes s. 15(1). The government would then have to justify the exclusion under s. 1.<sup>36</sup>

The Court, subject to this caveat, affirmed the application of section 15(2) as an independent ground in under-inclusion claims where the claim is made by a "disadvantaged group outside the object of the program". In so doing, it strongly affirmed the need to afford governments the flexibility to "target and attempt to remedy specific disadvantages":

Governments should, therefore, be able to rely on s. 15(2) to provide benefits to a specific disadvantaged group and should not have to justify excluding other disadvantaged groups even if those other groups suffer similar disadvantage. To hold that an affirmative government program violates s. 15 because it excludes disadvantaged groups or individuals that were never the object of the program would undermine

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<sup>33</sup> *Id.*, at 754-55.

<sup>34</sup> *Id.*, at 755.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 756.

the effectiveness of s. 15(2) and the ability of governments to redress disadvantage.<sup>37</sup>

The Court recognized that its analysis, in the end, came down to a proper characterization of the “object or purpose” of the program — the “key” to the particular program’s constitutionality. It also recognized the inherent difficulty in that task — and the easy attraction for governments to justify ameliorative programs by narrowly defining their purposes — effectively insulating them from review. The Court indicated that this would be avoided by adopting a purposive approach that looked to the “true character or underlying rationale” of a program. Under this approach, the Court would be called on to “scrutinize good faith assertions by government about purpose and to reject characterizations of purpose that are ‘colourable’”.<sup>38</sup>

In applying its analysis to the case at hand, the Court determined that the object of the Casino Rama project was “unquestionably ameliorative”, and the intended recipient Bands were clearly “profoundly disadvantaged”. Therefore, the only issue that divided the parties was the definition of the object or purpose of the program. If the project had been intended to benefit all Aboriginal communities, it was clearly under-inclusive. If it had been aimed, as Ontario argued, to ameliorate the conditions of registered Bands only, then it was not open to other groups, however disadvantaged, to challenge it on equality grounds.

The Court accepted the more narrow objective posited by Ontario. In light of the history of the project, the Court found the project had three principal objects<sup>39</sup>: (1) to respond to the economic needs of the Bands to enable them to improve the condition of Band members, especially those living on reserve; (2) to respond to the Bands’ long-standing interest in casino gaming and extensive experience in on-reserve gaming; and (3) to respond to the Bands’ assertions of self-government, particularly their assertion that gaming is included in their inherent right of self-government. Ultimately, the Court found that since the casino was itself on a reserve and Ontario’s dominant concern was to improve the social and economic conditions of Band members living on reserves, it was not discriminatory for Ontario to single out Bands on reserve for amelioration through the Casino Rama program and to exclude the appellate groups from a right to a share of the profits.

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<sup>37</sup> *Id.*, at 757.

<sup>38</sup> *Id.*, at 758.

<sup>39</sup> *Id.*, at 759.

(b) *The Supreme Court Decision in Lovelace: Section 15(2) as an Interpretive Aid to the Section 15(1) Equality Guarantee*

In the result, the Supreme Court of Canada upheld the decision of the Court of Appeal. The Court found that the exclusion of these groups from the Casino Rama project did not violate section 15 of the Charter and further, that the province's decision to exclude them from the Casino Rama project was not *ultra vires* the province of Ontario. The similarity between the approaches of the two Courts largely ends there.

(i) The Relationship of Section 15(2) to Section 15(1)

A significant development happened between the issuing of the Ontario Court of Appeal and Supreme Court of Canada decision: the latter issued its decision in *Law*.<sup>40</sup> In that decision, the ameliorative nature of a program or activity was one of several "contextual" factors to be considered in the determination of dignity under the section 15(1) analysis.<sup>41</sup>

Following *Law*, the Supreme Court did not follow the Court of Appeal's interpretation of the interplay between section 15(1) and section 15(2). That analysis would have had it begin its Charter analysis by first considering whether the program fit the criteria of section 15(2), hence eliminating the need to consider section 15(1). Instead, the Supreme Court noted that the Court of Appeal's interpretation of section 15(2) was decided without the benefit of the Supreme Court's decision in *Law*. After considering the *Law* framework as well as section 15(2), the Court concluded that the appeal could be wholly determined on the basis of the substantive equality framework of section 15(1).

Although the Court did not rely on section 15(2) in its judgment, it acknowledged the importance of commenting on the interplay between sections 15(1) and 15(2) in light of the lower courts' decision and the argument of the parties.

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<sup>40</sup> *Supra*, note 3.

<sup>41</sup> These factors included: (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue; (2) the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law: *Law, id.*, at para. 88.



The Court outlined what it saw as the two competing approaches<sup>42</sup> to understanding the application of section 15(2) and its relationship with section 15(1):

1. Section 15(2) is an interpretive aid to section 15(1), providing conceptual depth and clarity on the substantive nature of equality; or
2. Section 15(2) is an exemption or a defence to the applicability of the section 15(1) discrimination analysis.

The Court rejected the interpretation that section 15(2) acts as an exception or defence to section 15(1), such that ameliorative programs escape section 15(1) scrutiny. Instead, it held that section 15(2) acts as an interpretive aid that describes the scope of the section 15(1) right: it is “confirmatory and supplementary” to section 15(1) in indicating that the substantive equality guarantee of section 15(1) includes ameliorative programs. The Court suggested that claimants challenging ameliorative programs should first be directed to section 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by section 15(2). The Court noted that through this approach “one can ensure that the programs are subject to the full scrutiny of the discrimination analysis, as well as the possibility of review under s. 1”.

While affirming the role of section 15(2) as an interpretation of (as opposed to exception to) the substantive equality guarantee, the effect of the Court relegating section 15(2) to an “interpretive aid” would be the effective end to its significance as an independent ground in the jurisprudence leading up to the decision in *Kapp*.

Interestingly, in its final comments on the issue, the Court appeared to presage its willingness to revisit the relationship of section 15(2) to section 15(1), as it did in *Kapp*, when it stated that “we may well wish to reconsider this matter at a future time in the context of another case”.<sup>43</sup>

#### (ii) Correspondence Analysis: Groundwork for Future Confusion

Instead of carrying out the comparative analysis of the situation of the claimant and beneficiary groups within the section 15(2) analysis (as the Ontario Court of Appeal did) the hard work of comparison of the

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<sup>42</sup> The Court more recently in *Kapp*, *supra*, note 2, adopted what it saw as a “third option”, namely, the government can demonstrate that an impugned program meets the criteria of s. 15(2), rendering it possibly unnecessary to conduct a s. 15(1) analysis. It is not clear to the authors, however, how this third option is distinct from what the appellate Court did in *Lovelace*.

<sup>43</sup> *Lovelace* (S.C.C.), *supra*, note 17, at para. 108.

situations of the groups in relation to the program was done in the newly articulated “correspondence” factor articulated in *Law*. Unfortunately, as was ultimately acknowledged by the Supreme Court 12 years later in *Kapp*, this analysis suffered from a certain lack of clarity, rendering it difficult to apply consistently.

The correspondence analysis ultimately invites a comparison between three things: (1) the needs and circumstances of the claimant group; (2) the beneficiary group; and (3) the program, law or activity being challenged. Yet, unlike the Ontario Court of Appeal’s straightforward analysis under section 15(2) (did the claimant group fit (or not fit) within the intent of the object of the impugned ameliorative measure?), the Supreme Court was not precisely clear in determining how these three were to be compared in correspondence — and how that comparison was ultimately related to whether or not human dignity was offended. The Court did explain in *Law* that “legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity”.<sup>44</sup> While this is difficult to dispute as a matter of principle, as a practical test to apply, it is elusive at best. The Court’s subsequent decision in *Lovelace* did not help to elucidate the analysis.

For example, as the test is initially stated, picking up on the language of *Law*, the assessment of correspondence is between “the grounds” of discrimination and the actual needs, capacities and circumstances of the claimant.<sup>45</sup> This is a somewhat different comparison then that referred to in *Law* as being between the actual needs, capacity or circumstances of the claimants and the impugned “legislation” (or object of the program or activity). And it is precisely this comparison (to the impugned program or activity) that the Court does actually apply here:

I accept that the needs of the appellants correspond to the needs addressed by the casino program, for both the appellant and respondent aboriginal communities face these same social problems. However, the correspondence consideration requires more than establishing a common need. If only a common need were the norm, governments would be placed in the untenable position of having to rank populations without paying any attention to the unique circumstances and capabilities of potential program beneficiaries. I turn, therefore, to a

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<sup>44</sup> *Supra*, note 3, at para. 70.

<sup>45</sup> *Lovelace* (S.C.C.), *supra*, note 17, at para. 68.

consideration of the correspondence between the actual needs, capacities, and circumstances on the one hand, and the program on the other. In so doing, it becomes evident that the appellant aboriginal communities have very different relations with respect to the land, government, and gaming from those anticipated by the casino program.<sup>46</sup>

In applying (and building upon) the *Law* analysis, the Court in *Lovelace* recognized the importance of the Casino Rama project as a “partnered initiative” designed to address several needs at once: to regulate reserve-based gambling activities; to support the development of a government-to-government relationship between First Nations Bands and Ontario; and to ameliorate the social, cultural and economic conditions of Band communities.<sup>47</sup>

In examining the details of the program and the actual situation of the appellant groups, the Court concluded that they had very different relations with respect to land, government and gaming from those anticipated by the casino project.<sup>48</sup>

Turning next to the ameliorative nature of the program, the Court upheld the finding that the casino program was “designed to redress historical disadvantage and contribute to enhancing the dignity and recognition of bands in Canadian society”. The purpose of the program was, therefore, consistent with section 15(1) “since it is not associated with a misconception as to their actual needs, capacities and circumstances”.<sup>49</sup> This last consideration raises an issue that had to be wrestled with by future courts:<sup>50</sup> is it enough to demonstrate lack of correspondence to find this factor weighs in favour of a discrimination finding, or must the absence of correspondence be based upon a prejudicial “misconception”?

(iii) Significance of the *Lovelace* S.C.C. Analysis Leading up to *Kapp*

The analysis of the Supreme Court in *Lovelace* had the following hallmarks that were to define the equality jurisprudence for the years leading up to *Kapp*:

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<sup>46</sup> *Id.*, at para. 75.

<sup>47</sup> *Id.*, at paras. 74 and 82.

<sup>48</sup> *Id.*, at para. 75.

<sup>49</sup> *Id.*, at para. 87.

<sup>50</sup> This question was raised squarely in *Wynberg v. Ontario*, [2006] O.J. No. 2732, 82 O.R. (3d) 561 (Ont. C.A.), discussed in some detail below in section II.4(a).

- First, section 15(2) no longer had any independent application (although the Court reserved for itself the right to revisit that in the future).
- Second, the ameliorative aspect of a program (determinative under the Ontario Court of Appeal analysis) became relegated to one contextual factor in the dignity analysis.
- Third, the consideration of the ameliorative nature of the program was disconnected from the analysis of the objectives of the program in relation to the situation of the claimants: The real work fell to the newly articulated “correspondence factor”, now separated from the ameliorative factor and defined as “the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others”.
- Fourth, the analysis of the contextual “human dignity” factors, and in particular the correspondence analysis, was complex and difficult to apply.

#### **4. Section 15(2) Jurisprudence Following *Lovelace*: Sparring over Correspondence in the Ameliorative Context**

The jurisprudence considering under-inclusive claims against ameliorative programs that followed the Supreme Court’s decision in *Lovelace* reflects both a markedly diminished significance being attached to section 15(2), and a lack of consistency in the application of the correspondence factor.

The diminished significance is starkly reflected in the sparse case law that considers section 15(2), generally giving the subsection only cursory attention as an interpretative aid to section 15(1). Not surprisingly, in the face of the Supreme Court of Canada’s decision in *Lovelace*, no case actually relied on section 15(2) to explicitly uphold an otherwise unconstitutional provision. Those cases that did consider in some detail the *Lovelace* analysis betray some of the difficulty evident in it.

(a) *Application of Correspondence in Non-Aboriginal Context:*

Wynberg v. Ontario

One particularly revealing example (in the non-Aboriginal context) of the interplay of the correspondence factors, their link to human dignity and the significance of a finding that a program is ameliorative can be found in the 2006 decision of *Wynberg v. Ontario (Attorney General)*.<sup>51</sup> *Wynberg* was a section 15 challenge to the Ontario government's program to provide assistance to pre-school autistic children between the ages of two and five years (the IEIP program). The claimants, representing autistic children over the age of six and their parents, alleged a violation of section 15(1) on the grounds of age and disability. The lower court upheld the violation on the grounds that the age cut-off reflected and reinforced the stereotype that autistic children age six and over are virtually irredeemable.

This analysis was overturned on appeal. The Court held that in the claim of age discrimination, the plaintiffs failed to establish that the claimant group had suffered from historic disadvantage as a result of stereotyping on the basis of age, rather than autism. The appellate court found that the cut-off did not reinforce pre-existing prejudicial attitudes towards older autistic children because of their age.

On the critical correspondence analysis, the Court of Appeal found that the program corresponded to the capacities and circumstances of autistic children in the targeted group. In coming to this finding, the Appeal Court gave detailed consideration to the third contextual factor in *Law* as analyzed in *Lovelace*. Using section 15(2) as an interpretive aid, the Court found that the IEIP program was an ameliorative program. More importantly, it rejected the distinctions drawn by the lower court between the IEIP program and the program found in *Lovelace* to be non-discriminatory.

The Court of Appeal rejected the trial judge's distinction of *Lovelace* on two points in relation to correspondence, namely, that (unlike the IEIP program) the program at issue in *Lovelace* was a partnership between the government and the targeted disadvantaged group, rendering the correspondence between the program and the targeted group more close in *Lovelace*. The Court rejected this distinction on the grounds that such input is not required by the correspondence factor, and both cases reflected a high degree of correspondence, satisfying the requirement.

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<sup>51</sup> *Id.*

Second, the trial judge found that the exclusion of the claimant was associated with “a misconception about the actual needs, capacities and circumstances of the excluded group”, namely, that the IEIP mistakenly assumed that the claimant group would have their needs met in school through the special education programs being offered. Thus, the trial judge found that the *Lovelace* conclusion that the exclusion from a targeted ameliorative program was less likely to be discriminatory did not apply. The Court of Appeal rejected the significance of this finding, reflecting on *Lovelace*:

In our view, the Court was speaking of the kind of misconception it described at para. 71, namely one that reflects stereotyping of the excluded group because it unfairly portrays them or tends to demean their human dignity. If such a misconception is the basis for the exclusion, that would indeed undermine the purpose of s. 15(1) of the Charter. A misunderstanding that does not demean their human dignity would not undermine that purpose.

In this case, the IEIP assumed that the needs of the claimant group would be met through appropriate special education programs. The trial judge found that this was mistaken. *However, assuming the trial judge is correct, in our view that does not constitute a misconception as that notion was used in Lovelace.* It does not portray autistic children age six and over as not being disadvantaged or not having special needs. It does not unfairly portray them as having traits that they do not possess, nor does it tend to demean their human dignity. *The mistaken premise therefore does not undermine the acknowledged ameliorative purpose of the IEIP, a purpose that is consistent with s. 15(1) of the Charter.* It is not the sort of misconception referred to in *Lovelace*, and it is not a basis for refusing to apply the *Lovelace* conclusion.<sup>52</sup>

This revealing disagreement between the trial judge and Court of Appeal reflected the confusing interplay of the correspondence analysis, and how it was to be carried out in the context of an ameliorative program satisfying section 15(2). Specifically: (1) was correspondence a “human dignity” factor entirely independent of the ameliorative nature of the program? (2) how did the correspondence analysis change in the context of a program determined to be ameliorative? and, most importantly: (3) what degree of flexibility, if any, was to be afforded to governments fashioning ameliorative programs? For example, was the ameliorative nature of a program to be discounted for purposes of the

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<sup>52</sup> *Id.*, at paras. 70-71 (emphasis added).

equality analysis (as the trial judge found) because the program was based, in part, upon an incorrect premise about a claimant group? Or was the government permitted to get a premise wrong in relation to a claimant group so long as the error or “misconception” did not undermine the group’s human dignity by portraying it in a stereotyped way (as the Court of Appeal found)?

These were fundamental and basic questions which the Ontario Court of Appeal in *Wynberg* and other lower courts<sup>53</sup> had to wrestle with in the absence of any clear direction on correspondence in under-inclusive challenges to ameliorative programs following *Lovelace*. Like *Lovelace* (and again in *Kapp*) it was in the Aboriginal context that these questions were (and continue to be) raised with the most vexing urgency.

*(b) Application of Correspondence in the Aboriginal Context*

In crafting programs aimed at specific Aboriginal groups, the government has often created programs that, on their face, make difficult and critical distinctions based on “race” or other analogous grounds. The Constitution itself requires deciding who is an “Indian” for purposes of determining the parameters of Parliament’s jurisdiction.<sup>54</sup> But the myriad of distinctions that have to be drawn do not end with questions of jurisdiction under section 91(24). Programming has to determine such things as who can be registered as an Indian, who can vote for a Band council, what benefits are available to registered Indian Bands, and what benefits are available to members depending on whether they live on- or off-reserve. Needless to say, this reality poses particularly difficult challenges to governments seeking to fashion ameliorative programming aimed at the diverse and complex Aboriginal population. In recent years, there have been an increasing number of challenges brought by Aboriginal claimants to distinctions in government programming that

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<sup>53</sup> For an example of another Court wrestling with equality challenges to programs alleged to be “ameliorative” in a non-Aboriginal context, see *Clyke v. Nova Scotia (Minister of Community Services)*, [2005] N.S.J. No. 3, 2005 NSCA 3 (N.S.C.A.). Clyke was a single parent of three children whose financial assistance was cut off because she entered a post-secondary program that was to exceed two years. The program created an exception to the cut-off for disabled persons and Clyke was not disabled. The Court held that the exception to the cut-off was an ameliorative program. In doing so, however, it gave cursory attention to s. 15(2), referred to as a “confirmatory interpretive aid”. The case instead came down to a determination of comparator group, that is, the claimant had described her challenge as being on behalf of “single mothers” whereas the Court found the category was better understood as persons who are not physically or mentally disabled, which was not a listed or analogous category.

<sup>54</sup> Within the meaning of s. 91(24) of the *Constitution Act, 1867*, *supra*, note 12.

they consider to be under-inclusive, discriminatory and/or not reflective of their own vision of who they are.

Even prior to *Law* and *Lovelace*, the Supreme Court signalled its willingness to uphold equality rights challenges to distinctions in programming or legislation aimed at Aboriginal people. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,<sup>55</sup> the Supreme Court found that restrictions preventing off-reserve Band members from voting in Band elections were discriminatory under section 15(1). In this context, the Supreme Court established that residence for Aboriginal people could be an analogous ground under section 15 and therefore, serve as a marker of discrimination. In so doing, it made it clear, however, that reserve status should not be confused with ordinary residence given the enormously complex decisions Aboriginal Band members face in deciding to live on- or off-reserve. Further, it found that certain inherent “embedded” analogous grounds were necessary to permit meaningful consideration of intra-group discrimination.

(i) Correspondence Analysis in Challenges to Pan-Aboriginal  
Ameliorative Programming: *Misquadis* and *Gallant*

One interesting example of the difficulties of programming ambitious ameliorative programs (and the complexity of analyzing them from a substantive equality perspective) was made evident in challenges to the federal Aboriginal Human Resources Development Strategy (“AHRDS”) following *Lovelace*.

Under AHRDS, the federal government transferred funds to certain Aboriginal organizations for them to develop, design and deliver human resources programming to benefit all Aboriginal people, regardless of reserve status or where they lived. One of the challenges in the programming was the choice of which Aboriginal organizations the government was going to enter into agreements with and transfer funds to. The government transferred the funds to one of two different kinds of Aboriginal organization: (1) a provincial or regional organization affiliated with one of the three big national Aboriginal organizations (the Assembly of First Nations (“AFN”), the Métis National Council (“MNC”) and the Inuit Tapirisat of Canada (“ITC”)); or (2) an Aboriginal organization chosen under the Urban/Off-reserve Component of the strategy. Under this Component, the Aboriginal organization was

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<sup>55</sup> [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.).



chosen one of two ways — either by consensus among Aboriginals living within a jurisdiction, or, if no consensus existed, by a transparent Request for Proposal (“RFP”) process.

In the first challenge, *Misquadis v. Canada (Attorney General)*<sup>56</sup> claimant groups representing urban Aboriginal communities in Toronto and Niagara and a non-status Aboriginal organization in Eastern Ontario challenged the strategy on the grounds that they had been denied “community control” — a key benefit of the program.

The lower court applications judge, Lemieux J., accepted the characterization of the claimant and comparator groups proposed by the claimants, that is, the claimants were “[f]irst nation members of urban and off-reserve Aboriginal communities” as compared to “[f]irst nation members living on reserve.” He then accepted that the claimants had been denied the opportunity to have “local control” of their human resource programming and that this denial was on the grounds of Aboriginality-residence within the meaning of *Corbiere*.

The Federal Court of Appeal appeared ill at ease with both of these rulings, noting that “another judge” may have come to a different conclusion, including that the real objective of AHRDS was to provide employment training for Aboriginals, with local community control being only one way of meeting that objective. It did not, however, constitute a palpable error as there was some evidence to support it.<sup>57</sup> Second, the determination that the analogous ground was “Aboriginality-residence” did not entirely fit the situation of the claimants who were drawn from groups including non-status Indians who did not have the right to live on-reserve. Nevertheless, since it found the government had not argued this distinction, it was not necessary to draw it — and the Court of Appeal did not overrule the lower court decision on point.<sup>58</sup>

It also upheld Lemieux J.’s finding that since the primary benefit of the strategy was local community control, the program had the effect of treating Band and non-Band communities differently as the claimant group could not enter into the first kind of AHRDA (with regional and provincial affiliates of AFN, MNC and ITC) but instead had to be served by organizations chosen by the government to service Aboriginal people not living in reserve-based communities. These AHRDAs were found to

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<sup>56</sup> (*sub nom. Ardoch Algonquin First Nation v. Canada (Attorney General)*), [2003] F.C.J. No. 1841, [2004] 2 F.C.R. 108 (F.C.A.) [hereinafter “*Misquadis* (F.C.A.)”] upholding [2002] F.C.J. No. 1427, [2003] 2 F.C. 350 (F.C.) [hereinafter “*Misquadis* (F.C.)”].

<sup>57</sup> *Misquadis* (F.C.A.), *id.*, at para. 20.

<sup>58</sup> *Id.*, at para. 32.

be fundamentally different as they did not provide the same opportunity for local community control.<sup>59</sup>

In respect of the dignity analysis the lower court found (and the Court of Appeal upheld as not being “palpably in error”) that the strategy could not be upheld on correspondence grounds since “there was no reliable evidence that the [claimants’] needs, capacities and circumstances were any different from those of Aboriginals living on-reserve”.<sup>60</sup>

Further, the Appeal Court upheld Lemieux J.’s findings that AHRDS was a general ameliorative program designed to benefit all Aboriginals regardless of where they lived — and had failed, therefore to recognize that the respondents lived in communities worthy of recognition.<sup>61</sup> It dismissed the government’s appeal. Leave to appeal the decision to the Supreme Court of Canada was not sought.

The *Misquadis* case raises many difficult questions about the comparative and correspondence analysis in intra-group under-inclusive discrimination challenges to ameliorative programs. First, as noted by the Federal Court of Appeal, it took a very broad approach to the *Corbiere* “Aboriginality-residence” analogous ground — including non-status Aboriginal people within it — when the Supreme Court appeared to be very careful to restrict that analogous ground to off-reserve Band members. Further, it appears to take this analysis away from its core concept of residence. Second, the identified comparator group of reserve-based versus non-reserve communities appears to be a selective comparison of the groups that were actually receiving the benefit of the first AHRDA’s — including Métis and Inuit communities — none of which were reserve-based. Third, the decision appears to give short consideration to the complex correspondence analysis, finding that there was no reliable evidence that the needs, capacities and circumstances of the claimants were different than the needs of First Nations reserve-based communities. The analysis appeared to turn on a finding of common need instead of any in-depth analysis of the different circumstances of the claimant groups.

Interestingly, the same program was challenged in a very similar case — but with a very different result — in *Canada v. Gallant*.<sup>62</sup> In *Gallant*, the applications judge, following *Misquadis*, found that the

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<sup>59</sup> *Id.*, at paras. 25-26.

<sup>60</sup> *Id.*, at para. 36.

<sup>61</sup> *Id.*, at para. 36.

<sup>62</sup> *Canada (Attorney General) v. Gallant*, [2007] F.C.J. No. 1651, 371 N.R. 75 (F.C.A.), overturning *Gallant v. Canada (Attorney General)*, [2007] F.C.J. No. 17, 2007 FC 1 (F.C.).

government's decision to enter into a single AHRDA in the province of Prince Edward Island was an unjustified violation of the equality rights of the respondents, based on their status as off-reserve Aboriginal people of P.E.I. The applications judge found it discriminatory under section 15 of the Charter that the single P.E.I. Agreement concluded with the representative organization of the on-reserve Aboriginals of P.E.I. (the Mi'kmaq Confederacy) gave a benefit of "community control" over the Agreement to on-reserve Aboriginals, but not to off-reserve Aboriginals. The Court of Appeal overturned this finding on the grounds that no evidence existed to establish that the AHRDA funds "were not fairly and equitably distributed in PEI to Aboriginals, including off-reserve Aboriginals".<sup>63</sup> The Court then made a noteworthy finding that the "community control" the Applicants were allegedly deprived of "is in fact created by the *Indian Act* as a result of section 91(24) of the *Constitution Act, 1867*".<sup>64</sup> Finally, the Court dismissed the argument that the case before it could be based on "community control", since the evidence established that the program "was not directed at 'community control', but at the 'fair and equitable distribution of funds'".<sup>65</sup>

The discrepancy with *Misquadis* is striking in light of the fact that the very same program was being challenged, albeit in a different geographical context. What could explain this discrepancy? It appears, again, that the lack of clarity in respect of the analysis of an under-inclusive claim to an ameliorative program opens the door to courts (including in this case a different panel of the same court) to adopt a very different analysis of the same program. Is it realistic to expect greater consistency in such challenges, following the Supreme Court of Canada's decision in *Kapp*?

### III. A NEW DIRECTION FOR SUBSECTIONS 15(1) AND 15(2) IN *KAPP*

#### 1. The Majority Restates and Refocuses the Inquiry under Section 15(1)

One of the primary challenges in the section 15(1) equality analysis has always been how to assess whether a particular distinction that is based on a protected ground is discriminatory. The majority's decision in

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<sup>63</sup> *Gallant* (F.C.A.), *id.*, at para. 7.

<sup>64</sup> *Id.*, at para. 9.

<sup>65</sup> *Id.*, at para. 12.

*Kapp*<sup>66</sup> again focused on this fundamental equality rights issue. Beginning their reasons by squarely anchoring themselves in the Court's seminal decision in *Andrews*,<sup>67</sup> McLachlin C.J.C. and Abella J. re-emphasized section 15(1)'s purpose as a tool for furthering substantive, and not formal, equality. This conceptualization of equality has always been a common theme of the Court's equality jurisprudence, from its first consideration in *Andrews*, through to the reformulation of the framework for section 15(1) in *Law*, and beyond. It was also the starting point of the Ontario Court of Appeal's decision in *Lovelace*,<sup>68</sup> which squarely put the ameliorative nature of the program as the front and centre consideration governing equality rights challenges to ameliorative programs.

Chief Justice McLachlin and Abella J. restated the inquiry under section 15(1) as a two-stage test, as opposed to the three-step test that the court had devised under *Law*:

1. Has there been a distinction on an enumerated or analogous ground? (formerly the first two stages of the *Law* test)
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The majority then addressed and appeared to accept many of the critiques that have been levelled at the *Law* test. Chief Justice McLachlin and Abella J. traced much of the difficulties with *Law* to the centring of the equality inquiry around a claimant's human dignity. Referencing Dickson C.J.C.'s statement in *Oakes*,<sup>69</sup> the majority pointed out that the concept of dignity underlies all of the rights in the Charter, and was not solely relevant to section 15(1).<sup>70</sup> Moreover, the Chief Justice and Abella J. commented that not only is the concept of dignity inherently abstract and subjective, the requirement to demonstrate an infringement of "human dignity" has become an "additional burden on equality claimants".<sup>71</sup>

For this reason, the majority suggested that the more useful focus for courts in determining whether there has been a breach of section 15(1) is on the factors that "identify impact amounting to discrimination". In other words, the majority cautioned that the contextual factors articulated

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<sup>66</sup> *Supra*, note 2.

<sup>67</sup> *Supra*, note 13.

<sup>68</sup> *Supra*, note 4.

<sup>69</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>70</sup> *R. v. Kapp*, *supra*, note 2, at para. 21.

<sup>71</sup> *Id.*, at para. 22.

in *Law* should be used not as a hard and fast test for discrimination, but rather as indicators or hallmarks of whether discrimination exists in a particular case.<sup>72</sup>

In this way, the decision in *Kapp* does not articulate a new test for discrimination so much as it affirms the approach to substantive equality under section 15 in *Andrews* and set out in numerous subsequent decisions. The majority emphasized that section 15 has dual purposes, and that the focus of section 15(1) is on *preventing* discriminatory distinctions, while the focus in section 15(2) is on *enabling* governments to take proactive, affirmative measures to combat discrimination.<sup>73</sup>

## 2. The Majority Articulates a New Vision for Section 15(2)

The majority then turned to an assessment of section 15(2) and its application to the case. The majority begins its discussion by noting that in *Lovelace*, the Court had “appeared unwilling” to find that section 15(2) had independent force but had left open the possibility that this might be reconsidered in future. As noted above, there, Iacobucci J. had elaborated on two possible options for the interpretation of section 15(1): either that the provision could be used as an interpretive aid to section 15(1) (the approach the Court would adopt), or that it could function as exception or exemption to the operation of 15(1).

Chief Justice McLachlin and Abella J. proposed a so-called “third option” for the interpretation of section 15(2) — that if the government could demonstrate that an impugned program meets the criteria of section 15(2), then it is unnecessary to conduct a section 15(1) analysis at all. The majority emphasized that the two subsections of section 15 should be read together as both preventing and enabling governments to combat discrimination. As such, they cautioned that section 15(1) should not be read in a way that finds an ameliorative program aimed at combating discrimination to be discriminatory. While it is described as a “third option”, this really appears to be a reiteration of precisely what the Ontario Court of Appeal set out in its *Lovelace* decision, overturned on point by the Supreme Court. Nevertheless, it is a critical reaffirmation of the substantive law purpose underlying section 15(2). More importantly, it holds out the promise of making the ameliorative nature of a program the primary consideration when conducting a comparison of the actual

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<sup>72</sup> *Id.*, at paras. 23-24.

<sup>73</sup> *Id.*, at para. 25.

needs, capacities and circumstances of the beneficiary and claimant groups *in reference to the ameliorative goals of the impugned measure*.

In the majority's view, the framework for such an analysis proceeds as follows. Once a section 15 claimant demonstrates a distinction based on a protected ground, the government has the opportunity to demonstrate that the impugned law, program or activity is ameliorative to a disadvantaged group, and therefore not a violation of section 15. If the government fails to meet this burden, then the Court must then assess whether the program is discriminatory under section 15(1).

In adopting this third approach to dealing with section 15(2), the majority focused on two issues:

1. whether courts should look to the purpose or the effect of the legislation in question; and
2. whether a program must have an ameliorative purpose as its sole object or if this can be one of several objects.

On the first question, McLachlin C.J.C. and Abella J. held that based on the language of section 15(2), the focus of the inquiry should be on the legislation's purpose and not its effect. This is very close to the Ontario Court of Appeal's articulation of how the "objects" analysis should proceed when it rejected the need to conduct any assessment of the "effectiveness of the program or the means used to achieve the government's ameliorative object".<sup>74</sup> Noting the concern that this approach would lead to a purely subjective analysis of a program's intended purpose, McLachlin C.J.C. and Abella J. suggested that this concern could be very easily addressed. They noted that it was the Court's role to assess the genuineness of the legislative purpose when faced with an argument that a program ought to be protected under section 15(2). Again, this closely reiterates the analysis of the Ontario Court of Appeal in *Lovelace* that emphasized the need for the court to vigilantly and objectively assess the "true character or underlying rationale" for an ameliorative scheme.<sup>75</sup>

Unlike the Ontario Court of Appeal in *Lovelace*, the Supreme Court articulated a "rational connection" inquiry as to objective as follows: "Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?"<sup>76</sup> Interestingly,

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<sup>74</sup> *Lovelace* (C.A.), *supra*, note 4, at 754.

<sup>75</sup> *Id.*, at 757.

<sup>76</sup> *Kapp*, *supra*, note 2, at para. 49.

in coming to that inquiry, the Court quoted and relied upon the Manitoba Court of Queen's Bench decision in *Manitoba Rice Farmers*, canvassed earlier. That decision found that the government had to demonstrate a "real nexus between the object program as declared by the government and its form and implementation. It is not sufficient to declare that the object is to help a disadvantaged group if in fact the ameliorative remedy is not directed towards the *cause of the disadvantage*".<sup>77</sup> As previously discussed, this decision was the object of some academic criticism for imposing too onerous an obligation on government to establish an ameliorative program that addressed the "causes of the disadvantage".<sup>78</sup> How does one prove that — especially if the causes of disadvantage are related to complex social phenomena? Interestingly, the requirement to link the object to the cause of the disadvantage (which is at the heart of the academic debate about the *Manitoba Rice Farmers* decision), while quoted by the Court in *Kapp*,<sup>79</sup> is not repeated in the actual articulation of the rational connection test.<sup>80</sup>

On the second question, McLachlin C.J.C. and Abella J. held that an ameliorative purpose need not be the sole object of a particular program that falls under the ambit of section 15(2). They noted that government programs may have a number of goals, and that it would undermine the purpose of section 15(2) to require that a protected program have amelioration of a disadvantaged group as its sole object.

Applied to the facts of this case, McLachlin C.J.C. and Abella J. held that while the granting of the communal fishing licence created a distinction based on race, the program could be justified under section 15(2). Chief Justice McLachlin and Abella J. held that the program had an ameliorative purpose, and that this was targeted at a disadvantaged group. For these reasons, the Court dismissed the appeal on the basis that the program did not infringe the claimants' section 15 rights.

*Kapp*'s significance for challenges to ameliorative programs cannot be overstated. The decision reaffirms the strong and independent role of section 15(2), first set out in *Andrews*, as an articulation of the commitment to substantive equality. *Kapp* also reverses *Law*'s consideration of the ameliorative nature of a program as but one factor in the dignity analysis. The overly complex "correspondence" analysis,

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<sup>77</sup> *Manitoba Rice Farmers*, *supra*, note 21, at para. 54 (emphasis added); cited and relied upon in *Kapp*, *id.*, at para. 48.

<sup>78</sup> See Vizkelely, *supra*, note 23.

<sup>79</sup> *Kapp*, *supra*, note 2, at para. 48.

<sup>80</sup> *Id.*, at para. 49.

especially difficult to apply in challenges to ameliorative programs, appears to be downplayed, although not explicitly abandoned or replaced. In fact, none of the contextual factors set out in the *Law* dignity analysis are explicitly abandoned. While the Court explicitly rejected their rote application — as if they were legislative provisions — it remains very much to be determined whether they may have continuing relevance to the analysis. And this may include the contextual factor considering the ameliorative nature of the program. Is it possible an ameliorative program not strictly satisfying the requirements of section 15(2) could still be upheld, in part, on the grounds of having an ameliorative purpose as a contextual factor underlying dignity? That appears to be an open question.

Most significantly, in its focus on purpose as opposed to effectiveness, the decision sets out a fairly deferential and contextual approach to ameliorative programs, subject to the somewhat perplexing reference to the *Manitoba Rice Farmers* decision and its requirement to link object with the “cause of the disadvantage”.

*Kapp* also does not explicitly overturn another of the more controversial developments arising from or since *Law*, the comparator group analysis. Furthermore, it does not address how courts should apply section 15 in the more challenging context of a claim of under-inclusiveness, or what the role of section 15(2) should be in those kinds of challenges. For example, does section 15(2) stand as an independent ground for determining discrimination only when challenges are brought by advantaged groups to ameliorative programs? Certainly, that was not the approach of the Ontario Court of Appeal in *Lovelace* (the closest predecessor to *Kapp* in approach): that Court pointed out that there is nothing in the legislative history or substantive equality reasoning underlying section 15(2) that would justify restricting it to claims by advantaged groups. After all, that subsection affirms that governments may target and attempt to remedy specific disadvantage. Governments should not have to justify excluding other disadvantaged groups, even if they suffer similar disadvantage. As the Court pointed out, any less deferential approach would undermine the substantive equality purpose and effectiveness of section 15(2) by limiting the ability of governments to redress disadvantage.<sup>81</sup>

It is thus not yet clear how challenges by competing disadvantaged groups will be carried out post-*Kapp*, and how the legitimate right to

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<sup>81</sup> *Lovelace* (C.A.), *supra*, note 4, at 757.



challenge discriminatory under-inclusiveness will be balanced against the flexibility governments require in order to facilitate and encourage ameliorative programming necessary to the advancement of substantive equality.

#### IV. JUDICIAL CONSIDERATION OF *KAPP*

No case has yet answered the above questions directly, and the few post-*Kapp* section 15 cases are only somewhat revealing. The cases are most notable, perhaps, for the observation that while *Kapp* has certainly overtaken *Law* as the seminal decision on section 15, the full scope of its impact remains unknown. The post-*Kapp* cases have generally noted the decision's reformulation and refocusing of the equality analysis. However, they vary in terms of whether and the extent to which *Kapp* is viewed as a truly transformative decision, or merely a restatement or refocusing of the *Law* analysis.

In *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*,<sup>82</sup> for example, the Nova Scotia Court of Appeal stated, in a brief notation, that the framework for analyzing section 15 remains "the same in substance".<sup>83</sup> In that case, the plaintiff had challenged the cap on pain-related impairments of six per cent that was used to calculate his benefits. He claimed that this cap on pain-related impairments violated his equality rights because it did not reflect his level of disability or impairment as fully as impairment ratings for other injuries and conditions. In dismissing the appeal, the Nova Scotia Court of Appeal held that there was differential treatment on a protected ground, but that this distinction did not amount to discrimination.

In *Withler v. Canada (Attorney General)*,<sup>84</sup> on the other hand, the majority of the British Columbia Court of Appeal emphasized that *Kapp* represented a shift away from the equality jurisprudence of the previous decade. *Withler* was an age-based challenge to certain provisions of the *Canadian Forces Superannuation Act*<sup>85</sup> and the *Public Service Superannuation Act*.<sup>86</sup> In her majority opinion, Ryan J.A. discussed the significance of *Kapp* on the equality analysis. Justice Ryan noted that the decision in *Law* broadened the discrimination inquiry and proposed a

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<sup>82</sup> [2008] N.S.J. No. 314, 267 N.S.R. (2d) 364 (N.S.C.A.).

<sup>83</sup> *Id.*, at para. 44.

<sup>84</sup> [2008] B.C.J. No. 2507, 87 B.C.L.R. (4th) 197 (B.C.C.A.) [hereinafter "*Withler*"].

<sup>85</sup> R.S.C. 1985, c. C-17.

<sup>86</sup> R.S.C. 1985, c. P-36.

specific four-part test for the assessment of discrimination. She observed that *Kapp* refocuses the analysis away from this fixed test and that:

*Kapp* has reminded the courts that the essential question under s. 15(1) is whether the distinction created by the impugned legislation is based on personal characteristics of an individual or group that has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. In making this inquiry, the legislation must be placed in context which the four factors described in *Law* may help to delineate.<sup>87</sup>

As part of a larger, comprehensive insurance and pension scheme designed to deal with and accommodate the changing needs of an individual, the majority held that the plan may not have provided a perfect fit for each individual, but could not be considered discriminatory. The majority concluded that none of the contextual factors from *Law* acted as indicators of discrimination. They found that the plan was a broad-based scheme meant to accommodate the competing interests of various age groups covered by it. As such, the impugned provisions did not discriminate against the appellants.

One post-*Kapp* decision that has applied section 15(2) to save a government scheme from a charge of discrimination is the Nova Scotia Court of Appeal's decision in *Re Marshall Estate*.<sup>88</sup> In that case, the Court considered whether the provisions of various provincial Acts barring the appellant, an adopted child, from claiming a right of succession in her birth mother's estate, violated the appellant's section 15 rights. The appellant argued that the law drew a distinction between her and natural children on the basis of her adopted status, and that this distinction was discriminatory as it perpetuated the historic differential treatment of adopted persons.

Most interesting about the decision is the Court's finding that while the provisions drew a distinction on the basis of an analogous ground, they were nonetheless ameliorative for adopted individuals and therefore the provisions were protected under section 15(2). The Court accepted that adopted status was an immutable characteristic, and therefore protected as an analogous ground under section 15. The Court also accepted that the provisions drew a distinction between the appellant and non-adopted children on the basis of her adopted status.

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<sup>87</sup> *Withler*, *supra*, note 84, at para. 162.

<sup>88</sup> [2009] N.S.J. No. 103, 275 N.S.R. (2d) 383 (N.S.C.A.).

However, Fichaud J.A., for the Court, held that the provisions aimed to better integrate adoptees into their families' lives, and therefore treated adoptees equivalently as birth children of their adoptive parents. For this reason, Fichaud J.A. held that the legislation did not perpetuate stereotyping of adoptees, nor did it signal that adopted children are "less deserving of concern, respect, and consideration". Rather, in his view, the provisions were ameliorative, and therefore saved under section 15(2).<sup>89</sup>

The only case from the Supreme Court to have applied section 15(1) post-*Kapp* is the decision in *Ermineskin Indian Band and Nation v. Canada*.<sup>90</sup> In that case, the Bands claimed that the Crown had fiduciary obligations to invest oil and gas royalties on behalf of the Bands, rather than depositing them into the Consolidated Revenue Fund.

As part of their claims, the Bands challenged the constitutional validity of subsection 61 to section 68 of the *Indian Act* as being discriminatory against them, contrary to section 15(1). They argued that if the Court found that those provisions precluded the Crown from investing the royalties in the manner of a common law trustee, the result was discriminatory. They argued that because they were Indians, they had been deprived by the *Indian Act* of the rights available to non-Indians whose property was held in trust by the Crown.

The Court dismissed the appeals and held that the Crown had neither the obligation nor the authority to invest the appellants' royalties. What is most interesting about the *Ermineskin* decision from the section 15 standpoint is that the Court's treatment of section 15(1) makes no reference to *Law*, the four factors from *Law* or the concept of human dignity. Instead, Rothstein J., for the Court, looked at the impugned distinction from a contextual viewpoint and concluded that the distinction is and was intended to *benefit* the Bands — through increased liquidity — rather than disadvantage them. For this reason, Rothstein J. held that the distinction was not discriminatory. The provisions did not preclude investment, provided the investments were made by the Bands or trustees on their behalf after expenditure of funds from the Consolidated Revenue Fund to the Bands and the release of the Crown from further responsibility with respect to the royalties.

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<sup>89</sup> *Id.*, at para. 38.

<sup>90</sup> [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.).

## V. WHAT DOES THE FUTURE HOLD FOR SECTION 15 IN LIGHT OF *KAPP*?

While *Kapp*<sup>91</sup> represents a point of departure for the analysis under section 15(1), it remains to be seen whether the decision will truly alter the jurisprudential landscape in the years to come. The Court's reformulation of the test under section 15(1) is most notable in its refocusing the section 15(1) analysis back to its origins in *Andrews*<sup>92</sup> and its departure from the focus on human dignity, as set out in *Law*.<sup>93</sup> Certain aspects of this reformulation are benign — for example, the re-articulation of the test for equality as a two-step, rather than a three-step process.

One of the main criticisms that the Court appears to accept in *Kapp* was that the *Law* test, in delineating its four contextual factors, created a rather rigid test for discrimination that in the end proved to be an additional burden to equality-seekers. One looming question that remains is whether this new formulation of the section 15(1) analysis will, in fact, alter the “burdens” for section 15 claimants in this analysis. The onus still remains on claimants to demonstrate that a particular law, program or activity draws a distinction between them and others on the basis of a protected ground. At the same time, claimants must show that the distinction is discriminatory, and may still draw upon the four “indicators of discrimination” as set out in *Law*.

This refocusing of the section 15(1) analysis, whereby the focus moves away from the consideration of contextual factors as indicators of “human dignity”, but becomes hallmarks or indicators of discrimination, may well represent *Kapp*'s most significant impact on the section 15(1) analysis. However, it is again unclear how substantial a departure this development will ultimately represent. It is important to note that this interpretation of *Law* is consonant with Iacobucci J.'s original positioning of the factors as a set of non-exclusive factors for the consideration of whether a claimant's dignity has been infringed. As Iacobucci J. held in *Law*:

There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation has the effect of demeaning his or her dignity, as dignity is understood for the purpose

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<sup>91</sup> *Supra*, note 2.

<sup>92</sup> *Supra*, note 13.

<sup>93</sup> *Supra*, note 3.

of the Charter equality guarantee. In these reasons I discuss four such factors in particular, although, as I discuss below, *there are undoubtedly others, and not all four factors will necessarily be relevant in every case.*<sup>94</sup>

Moreover, while there has been much criticism of *Law* for delineating a rigid approach to assessing discrimination under section 15(1), the Supreme Court has never required the presence or absence of any or all of these factors as a pre-condition to a finding of a violation or non-violation of section 15(1). In many cases, while there is an ultimate determination of whether a distinction discriminates, the analysis of individual contextual factors from *Law* is mixed in terms of whether they indicate in favour of a finding of discrimination. Indeed, one of the major criticisms of the *Law* analysis has been the fact that the second factor from *Law* (correspondence) has become the defining factor for determining whether a particular distinction is held to be discriminatory.<sup>95</sup> As noted in some detail above, it is the correspondence analysis that has been so vexing and elusive a factor, resulting in a complex and difficult-to-apply analysis. The downplaying of this factor, at a minimum, should raise hopes that a simpler and more straightforward comparative analysis, along the lines of the Ontario Court of Appeal's decision in *Lovelace*,<sup>96</sup> may be forthcoming. In the end, however, a comparative analysis cannot be avoided.

A further criticism that the Court appears to accept in *Kapp* is that the focus on comparator groups in *Law* (and in decisions post-*Law*) has allowed "the formalism of the ... jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike".<sup>97</sup> The Supreme Court has always recognized that analysis of discrimination is an inherently comparative exercise. As the Court noted in *Andrews*, an individual's claim under section 15(1) can only be determined "by comparison with the conditions of others in the social

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<sup>94</sup> *Law, id.*, at para. 62 (emphasis added).

<sup>95</sup> See in particular cases such as *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835 (S.C.C.) and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.). See also Bruce Ryder, Cidalia Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103, for a discussion and analysis of this issue.

<sup>96</sup> *Supra*, note 4.

<sup>97</sup> *Kapp, supra*, note 2, at para. 22. See also Sophia Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 J. L. & Equality 81.

and political setting in which the question arises”.<sup>98</sup> With the Supreme Court’s decision in *Hodge*<sup>99</sup> in 2005, the comparator group analysis emerged as one of the pivotal issues to the Court’s approach to assessing differential treatment in benefit schemes. In *Auton*<sup>100</sup> McLachlin C.J.C. reiterated the four principles concerning comparator groups from *Hodge* as follows:

1. The choice of the correct comparator is crucial.
2. The Court must ensure that the comparator is appropriate.
3. The comparator group should mirror the characteristic of the claimant except for the personal characteristic related to the enumerated or analogous ground raised as the basis for discrimination.
4. A claimant relying on a personal characteristic related to disability may invite comparison with those suffering from a different type of disability or a disability of greater severity.<sup>101</sup>

While recognizing the difficulties that accompany the comparator analysis, the Chief Justice and Abella J. provide no comments on how to move forward with respect to this issue. While this issue is difficult, the cases illustrate that it is also a fundamentally important consideration when assessing section 15(1) claims, especially those that involve large social benefit schemes. These schemes are designed to provide benefits to a large number of individuals and in most cases are structurally designed to draw distinctions in benefits among different groups. Thus, while the critiques of this analysis may be well founded, *Kapp* provides no suggestions on how the Court may in future unravel this difficult and thorny issue.

## VI. CONCLUSION AND SUMMARY OF FINDINGS

The relegation of ameliorative purpose to a single factor in the human dignity analysis, beginning with *Law*<sup>102</sup> (and applied in

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<sup>98</sup> *Andrews, supra*, note 13, at 146.

<sup>99</sup> *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.).

<sup>100</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

<sup>101</sup> *Id.*, at paras. 51-54.

<sup>102</sup> *Supra*, note 3.

*Lovelace*)<sup>103</sup> did not assist the substantive equality rights purpose behind section 15. It also created confusion and inconsistency in how to apply the elusive dignity analysis, particularly in the context of under-inclusive challenges by another disadvantaged group to ameliorative programs. In its move away from *Law*'s focus on dignity, *Kapp*<sup>104</sup> holds out the promise of clarifying this confusion and setting a new jumping-off point for equality rights — particularly in respect of equality challenges to ameliorative programs.

Moreover, in its embrace of section 15(2) as an independent equality rights ground, *Kapp* re-embraces the original substantive equality purpose of sections 15(1) and 15(2), as understood by the framers of the Charter and the very early jurisprudence of the Supreme Court. The struggle with the difficult interplay between the two subsections of section 15 was made apparent in the early jurisprudence of lower courts interpreting section 15(2) as an exception to the equality rights guarantee of section 15(1). The Ontario Court of Appeal's short-lived decision in *Lovelace* can be seen as a "high-water mark" for a strong and independent role for section 15(2) that is firmly rooted in the substantive equality rights analysis set out by the early Supreme Court of Canada decisions on section 15.

For all of its promise, however, *Kapp* leaves several difficult challenges in the equality jurisprudence unanswered. *Kapp* was not, for example, a challenge to an ameliorative program based on a claim of under-inclusiveness. It remains to be seen, therefore, whether or not its articulation of an independent role for section 15(2) will apply in that critical and difficult context. As found by the Ontario Court of Appeal in *Lovelace*, there would be no substantive equality rationale for restricting the independent application of section 15(2) to challenges by advantaged groups to ameliorative programs. Governments require flexibility to choose particular disadvantaged groups to benefit — even if it means excluding other disadvantaged groups.

Moreover, while the Court seems to accept the criticisms that the *Law* analysis had become formalistic and difficult to apply, *Kapp* does not explicitly overturn two of the major controversial developments from *Law* — the comparator group or correspondence analysis. In fact, none of the contextual factors underlying the *Law* dignity analysis are explicitly abandoned or overturned, leaving open the question of what

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<sup>103</sup> *Supra*, note 4.

<sup>104</sup> *Supra*, note 2.

role they may have in future cases. This may include the “ameliorative program” contextual factor, which on its face may appear redundant, yet could conceivably uphold, in part, a future ameliorative program that does not strictly meet the requirements of section 15(2).

Equally up for future consideration is how the “rational connection” test articulated by the Court will be interpreted. As stated, the test is fairly deferential and a reasonable check on the government by allowing judicial review of programs that only “nominally” seek to serve ameliorative objectives but in practice serve other non-remedial objectives. While it does not appear to have been the intent of the Court, the quote and reliance upon the onerous test set out by the Manitoba Court of Queen’s Bench in *Manitoba Rice Farmers*<sup>105</sup> that further requires a nexus between the object of the program and the “cause of the disadvantage” may open the door to a more interventionist and onerous test being imposed in consideration of future ameliorative programs. Certainly, the rational connection test leaves a door wide open to significant judicial review of programs that include some non-remedial objectives.

It remains to be seen how the Court will wrestle with these difficult issues in future cases, particularly in the challenging context of under-inclusive claims by disadvantaged groups.

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<sup>105</sup> *Supra*, note 21.



